SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 600

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Petitioners,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners, plaintiffs below, seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal of an amended complaint by the United States District Court for the Southern District of New York but without prejudice to plaintiffs' right to transfer the case to the admiralty side of the court for the adjudication of the second of three counts of the amended complaint.

Plaintiffs' original complaint, as amended on the oral argument of defendant's first motion to dismiss,

alleged two claims for damages for the death of their decedent. It alleged that Marshal L. Noel, while a passenger on board an aircraft owned and operated by the defendant en route from New York to Caracas, died "when the aircraft crashed into the ocean." The first claim for damages was based on the Federal Death on the High Seas Act (41 Stat. 537, 46 U. S. C. 761). The second was based on the Warsaw Convention (49 Stat. 3000). The United States District Court for the Southern District of New York dismissed this original complaint for lack of jurisdiction of the subject matter on the grounds that (1) actions under the Federal Death on the High Seas Act are cognizable only in admiralty, and (2) the Warsaw Convention does not create an independent right of action. 144 F. Supp. 359.

Plaintiffs then amended their complaint again and this time alleged that "the said Marshal L. Noel died while on board the said aircraft which was then in the airspace above the Atlantic Ocean at a point approximately thirty miles from Asbury Park, New Jersey." This second amended complaint contained three counts. The first count was apparently based upon New York law, the second upon the Federal Death on the High Seas Act, and the third on the Warsaw Convention. Defendant's motion to dismiss this second amended complaint was granted by Judge Cashin, who ruled that there should be no material difference between deaths in, on or above the water and who, therefore, adhered to his original decision. 154 F. Supp. 162.

The Court of Appeals affirmed the dismissal of this amended complaint, "but without prejudice to plain-

tiffs' right to transfer the case to the admiralty side of the court for adjudication of the second count of the amended complaint." 247 F. 2d 677.

Argument

Although petitioners advanced and argued several points of law in the court below (including their point that a suit under the Federal Death on the High Seas Act may be brought as a civil jury action), on their application to this Court they have presented only one question, to-wit:

> "Whether the Warsaw Convention, a treaty of the United States, creates an independent cause of action against the air carrier for death incurred on board an international flight."

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. The judgment of the Court of Appeals sought to be reviewed is not a final judgment on the merits and the issue involved is not of such fundamental importance as to warrant review by this Court.

2. Article 17 of the Warsaw Convention creates a presumption of liability in the event of the death or wounding of a passenger in international transportation but, as the Court of Appeals correctly ruled, it did not create an independent right of action.

3. The only cases on the point decided by the federal courts hold that the Warsaw Convention does not create a cause of action, and this is clear from the language of the Convention itself.

POINT I

The judgment of the Court of Appeals sought to be reviewed is not a final judgment on the merits and the issue involved is not of such fundamental importance as to warrant review by this Court.

In dismissing the original complaint wherein the plaintiffs alleged that their decedent died when the aircraft crashed into the ocean, Judge Cashin, United States District Judge for the Southern District of New York, did so "without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law." In affirming the dismissal of the second amended complaint the Court of Appeals did not finally determine the rights of the parties; it merely determined (1) that the first and third counts in plaintiffs' second amended complaint were insufficient as a matter of law in that each was predicated upon a *lex loci delicti* that did not exist. As to the second count, the Court of Appeals pointed out that plaintiffs' procedural steps were wrong in bringing it on the law side of the court and the dismissal of this count was affirmed without prejudice to plaintiffs' right to transfer it to the admiralty side of the court.

That this Court has power to review a non-final judgment in a proper case is unquestioned, but as Mr. Justice Gray stated in an opinion which has been adhered to consistently since 1893,

> "* * * Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an

> interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.
>
> * * * Doubtless, this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. * * *" *Amer. Const. Co.* v. *Jacksonville Railway,* 148 U. S. 372, 384-385.

As Judge Cashin pointed out in his decision dismissing the first amended complaint, the ends that plaintiffs sought to gain by using the civil rather than the admiralty side of the court were "(1) a jury trial; (2) broader discovery proceedings, and (3) the probability of a less expensive litigation proceeding. It is not contended that the admiralty forum would deny to the plaintiffs their substantive cause of action for wrongful death." 144 F. Supp. 359, 361.

POINT II

Article 17 of the Warsaw Convention creates a presumption of liability in the event of the death or wounding of a passenger in international transportation but, as the Court of Appeals correctly ruled, it does not create an independent right of action.

In Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, in which he reported to the President concerning the advisability of adherence to the Warsaw Convention (Senate document, Executive G, 73rd Cong., 2nd Sess.), he said (pp. 4, 5):

> * * *
>
> The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger, subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The

principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

* * * *

The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention.

* * * *"

As Secretary Hull pointed out, the Convention established a presumption of the carrier's liability for injuries or death of a passenger (art. 17). This is subject, however, to a limitation of the liability to 125,000 francs, equivalent in round figures to $8,300 (art. 22). This limitation can be defeated only by proof that the damage has been caused by the wilful misconduct of the carrier or his agents, or by such default as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct (art. 25).

The Convention is analogous in some respects to the shipowners' limitation of liability statutes (46 U. S. C. §§ 183 *et seq.*), which limit the shipowner's liability to the value of the vessel and her pending freight in the absence of proof that the loss was caused with the privity or knowledge of the owner.

In rejecting appellants' contention in the court below that the Convention created an independent right of action, Judge Lumbard stated (Pet. 32):

> "In any event, we agree with our prior decision in *Komlos* v. *Compagnie Nationale Air France,* 209 F. 2d 436, 438 (2 Cir. 1953), which impliedly agreed with Judge Leibell's decision, *Komlos* v. *Compagnie Nationale Air France,* 111 F. Supp. 393 (S. D. N. Y. 1952), that the Convention did not create an independent right of action. As Judge Leibell pointed out, Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. * * *"

The case of *Wyman* v. *Pan American Airways,* 181 Misc. 963, affd. without opinion, 267 App. Div. 947, affd. without opinion, 293 N. Y. 878, cert. den. 324 U. S. 882 (1945), completely supports the proposition that the Warsaw Convention did not create a cause of action. Petitioners' footnote reference to the *Wyman* case on page 12 of their brief is entirely misleading. In the *Wyman* case the plaintiffs had failed to prove a cause of action for wilful misconduct and after both sides rested Mr. Justice Schreiber, the trial judge, directed a verdict for plaintiffs in the sum of $8300.

Thereafter, plaintiffs moved to set aside the verdict as inadequate and for a new trial. It was on this motion that Judge Schreiber wrote his opinion in the case which became an integral part of the record on appeal which was presented to the Appellate Courts of New York State and to this Court. In his opinion on the motion Mr. Justice Schreiber said (181 Misc. 963, 965-966):

> "* * * The right to bring a death action is purely statutory. It did not exist at common law (*Debevoise* v. *N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 377) and depends upon the existence of a statute creating a right of action at the place where the 'force impinged' causing injuries and death. (*Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465; *Kristansen* v. *Steinfeldt*, 165 Misc. 575, revd. on other grounds 256 App. Div. 824). No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies. (*Choy* v. *Pan-American Airways Co.*, 1941 Am. Maritime Cas. 483 [U. S. Dist. Ct., S. D. N. Y.].)
>
> The right to any recovery in this action thus must depend on some statute. The New York Decedent Estate Law (§ 130) can have no application as the injury and death did not occur within the territorial confines of the State (*Whitford* v. *Panama R. R. Co., supra*). The only possible relevant statute, therefore, is the Federal Death on the High Seas Act (U. S. Code, tit. 46, § 761 *et seq.*), similar in effect to other statutes giving such right of action. This statute is applicable to airplane accidents on the high seas

(*Choy* v. *Pan-American Airways Co., supra*) and that an action thereon may be maintained in the State courts has been held by the Appellate Division in this case (*Wyman* v. *Pan American Airways, Inc.*, 262 App. Div. 995). * * *"

In their petition for a writ of certiorari the plaintiffs Wyman predicated the jurisdiction of this Court to hear the appeal on the following basis (p. 5):

> "The jurisdiction of this Court is invoked under Judicial Code, Section 237, (a) and (b), United States Code, Title 28, Section 344(b). There is here involved the interpretation to be given to a Treaty of the United States of America, to wit: the Warsaw Convention, which respondent claimed granted to it a partial immunity from liability. The treaty was specifically pleaded in the answer of the respondent and was the sole basis of decision from which review is sought."

and two of the petitioners claimed "Reasons for Issuance of Writ" in the *Wyman* case were that (p. 11):

> "* * * There should be, therefore, a final authoritative disposition of the meaning and application of the Warsaw Convention with respect to the limitation of liability of common carriers engaged in international carriage by air.
>
> (2) This is the first time that the question of the applicability of the Warsaw Convention was presented to the State Court of Appeals, and if this Court grants certiorari, it will be the first time that this Court will consider the question of the meaning to be given to the Warsaw Con-

vention, particularly with respect to Articles 22 and 25, dealing with limitation of liability."

It will be seen from the foregoing that the issues involved in the appeal in the *Wyman* case involved a lot more than "whether plaintiff was entitled to interest on his judgment".

Petitioners' argument at the bottom of page 7 and top of page 8 of their petition, serves to confuse rather than to clarify the Court of Appeals decision. They go to extremes in their attempt to establish that they do not have a cause of action under the Federal Death on the High Seas Act. Yet no court or judge has so ruled in this case. In fact the converse is true. When they pleaded in their original complaint that their decedent died "when the aircraft crashed in the ocean", Judge Cashin's order dismissing their complaint as a civil jury action distinctly provided that such dismissal was "without prejudice to plaintiff's right to institute a suit in admiralty against defendant". In dismissing their second amended complaint, Judge Cashin adhered to his original decision and indicated that in his opinion, insofar as the Federal Death on the High Seas Act was concerned, it made no difference whether a person "died above, on or in the sea".*

Petitioners erroneously state at the top of page 8 of their petition that the Court of Appeals placed the "vast area above the oceans of the world in the category of *loci delicti* with no law creating a cause of action for wrongful death, precluding recovery for wrong-

* Judge Clancy had arrived at the same conclusion with respect to this point in *Choy* v. *Pan-American Airways Co.* (S. D. N. Y.), 1941 A. M. C. 483, 484.

ful death in the air space above the ocean, and giving the air carrier the additional out of putting plaintiffs to the task of proving that decedents died on the ocean rather than in the air space above it." On the contrary, the Court of Appeals distinctly left the question of the applicability of the Federal Death on the High Seas Act to a death in the air spaces above the ocean to await the outcome of the trial of that issue. Furthermore, it should be noted that in the *Wyman* case plaintiffs' testator "was lost in the disappearance without trace of that aircraft over the South Pacific Ocean". Nevertheless, the court there held that the Federal Death on the High Seas Act was the statute that gave plaintiffs the right of action. There was no attempt in the *Wyman* case to determine whether the death of plaintiffs' testator occurred on, in or over the Pacific Ocean.

The inconsistency of petitioners' argument is again demonstrated on page 10 of their petition wherein they refer to the fact that cases have held "that where an airplane disappears without a trace, an action for negligence lies against the carrier based on the theory of *res ipsa loquitur*." In support of this statement they cite in a footnote the case of *Haasman* v. *Pacific Alaska Air Express*, 100 F. Supp. 1 (D. Alaska 1951), aff'd *sub nom.*, *Des Maris* v. *Beckman*, 198 F. 2d 550 (9th Cir. 1952). It should be noted that the *Haasman* case involved a suit for the death of persons who were passengers on an airplane flight from Yakutat, Alaska, to Seattle, Washington. (It was therefore not an international flight as defined in the Warsaw Convention.) The plane was last heard from in the vicinity of Sitka. No trace of the plane, its cargo or passengers, had

ever been found. Hence, there was no way of determining that the plane had actually crashed in the territory of Alaska. In entering judgment for the plaintiffs, District Judge Folta of the United States District Court for the District of Alaska, Third Division, stated (p. 2):

> "I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. * * *"

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court "on the grounds and for the reasons stated in the District Court's opinion".

Presumably the District Court and the Court of Appeals in the *Haasman* case were not troubled with either the Warsaw Convention or the *lex loci delicti* in that case and the question presented was "whether the doctrine of *res ipsa loquitur* applies where the plane disappears during flight without a trace." In holding that the doctrine did apply the District Court entered judgment for the plaintiff pursuant to a stipulation of the parties. In this connection it should be noted that in some jurisdictions *res ipsa loquitur* is considered to be a matter of substantive law whereas in others it is regarded as a matter of procedure or a procedural rule of evidence. (*Lobel* v. *American Airlines*, 192 F. 2d 217, cert. den. 342 U. S. 945).

POINT III

The only cases on the point decided by the federal courts hold that the Warsaw Convention does not create a cause of action, and this is clear from the language of the Convention itself.

In petitioners' Point V they assert that "Neither this court, nor for that matter any court, before the decision in the instant case has squarely held that the Warsaw Convention creates no independent cause of action." They then cite three cases allegedly holding that the Warsaw Convention does create a cause of action, to-wit: *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V.*, 107 N. Y. S. 2d 768 (Sup. Ct. N. Y. Co. 1951), aff'd without opinion, 281 App. Div. 965 (First Dept. 1951); *Komlos* v. *Compagnie Nationale Air France,* 111 F. Supp. 393 (S. D. N. Y. 1952), rev'd on other grounds, 209 F. 2d 436, cert. den. 348 U. S. 820 (1954); and *Choy* v. *Pan American Airways Company,* 1941 A. M. C. 483 (S. D. N. Y. 1951). Neither the *Komlos* case nor the *Choy* case so hold. As a matter of fact in the *Choy* case, Judge Clancy dismissed the cause of action based on the Warsaw Convention.

The question of whether the Warsaw Convention created a cause of action was specifically raised and decided adversely to petitioners' contention in *Komlos* v. *Compagnie Nationale Air France, supra.* In that case, involving an airplane crash in the Azores, the defendant argued that the Warsaw Convention itself created a right of action, and that therefore the law of the place of the accident had no application.

Judge Leibell considered all of the cases in which the question had been touched upon up to that time, including *Wyman* v. *Pan American Airways, Inc., supra, Garcia* v. *Pan American Airways, Inc.*, 269 App. Div. 287, aff'd 295 N. Y. 852, cert. den. 329 U. S. 741, 274 App. Div. 996, cert. den. 338 U. S. 824, and *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V., supra,* and came to the following conclusion (111 F. Supp. at p. 401):

> "I am of the opinion that the Warsaw Convention does not create a right of action for wrongful death. The Convention creates a *presumption* of liability from the happening of the accident. Art. 17. It gives the carrier complete exoneration from liability if the carrier can prove that it took all necessary measures to avoid the damage. It recognizes the lex fori doctrine of contributory negligence, Art. 21, assuming that under certain conditions a passenger's negligence might contribute to the damage. It grants a limitation of the liability of the carrier, Art. 22(1), to 125,000 francs (approximately $8,300) if the carrier is not entitled to exoneration from liability under Art. 20, and is not shown to be guilty of 'wilful misconduct', Art. 25, which caused the damage.
>
> That the Convention did not create any more than a presumption of liability is clear from the letter of Secretary of State Hull, dated March 31, 1934, addressed to the President, recommending the adherence of the United States to the Convention. * * *"

Judge Leibell also noted the opinion of the New York Court of Appeals in *Ross* v. *Pan American Air-*

ways, Inc. (1949), 299 N. Y. 88, in which the court, while not passing on the specific question, referred to the Convention as a treaty which "* * * regulates and limits the liability of air carriers engaged in international air transportation" (299 N. Y., at p. 91).

He therefore held that the right of action was given by Portuguese law, but that it had been assigned to the insurance carrier by operation of the New York Workmen's Compensation Law, and he therefore dismissed the action brought by the administratrix.

The Court of Appeals for the Second Circuit reversed (209 F. 2d 436), but only because it held that the Portuguese concept of "moral damages", unknown to our law, prevented the assignment of the entire cause of action; and rather than split the cause of action, it held that the whole cause could be sued upon by the administratrix.

Further support for the conclusion that the Convention was not intended to create a cause of action may be found in the language of the Convention itself. Its official title, for example, is "Convention for the Unification of Certain Rules Relating to International Transportation By Air," and not, as one would expect if petitioners' argument were correct, "Convention for the Establishment of Uniform Liability of Air Carriers engaged in International Air Transportation." The concept that the Convention deals only with certain "rules relating to" liability rather than the liability itself appears throughout: for example, in Articles 3(1)(e), 3(2), 4(3)(h), 4(4), 5(2), 8(q), 23, and 32.

In at least two other cases decided by the District Courts in the Second Circuit, it has been assumed, either explicitly (*Supino* v. *Compagnie Nationale Air*

France (E. D. N. Y., 1951), 100 F. Supp. 214, 216) or implicitly* (*Rashap* v. *American Airlines, Inc.* (S. D. N. Y., 1955), 1955 U. S. & Can. Av. R. 593) that the Convention creates no right of action. In the latter case, Judge Dawson dismissed four causes of action as having no basis in the law of Texas, where the accident occurred. Furthermore the early holdings of the *Wyman* and *Choy* cases that the Convention does not create a cause of action have been cited as stating the existing law in a note in 13 A. L. R. (2d), at p. 348, where the author states:

> "Although the liability limitations contained in the Warsaw Convention have been applied to death actions in international air transportation, it should be noted that the Convention itself is not a death statute, and that the right of action for death of a passenger over the ocean is governed by the Federal 'Death on the High Seas Act of 1920.' Wyman v. Pan American Airways, Inc., 181 Misc. 963 * * *; Choy v. Pan American Airways Co. (F DC NY) [1941] US Av 10, s. c. [1942] US Av 93."

In *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V., supra,* Mr. Justice Hecht of the New York Supreme Court, in passing upon a motion to dismiss five causes of action based on a wrongful death, sus-

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* Other Warsaw Convention cases where the lower courts and the parties took it for granted that the *lex loci delicti* governed the right to recovery: *Pekelis* v. *T. W. A.*, 187 F. 2d 122, cert. den. 341 U. S. 951 (1951) [Law of Ireland pleaded and relied upon]; *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105, 305 N. Y. 830, cert. den. 346 U. S. 874 (1953) [Law of Newfoundland pleaded and relied upon]; *Froman* v. *Pan American Airways*, 299 N. Y. 88, 284 App. Div. 935, leave to appeal den. 285 App. Div. 806, 308 N. Y. 1050, cert. den. 349 U. S. 947 (1955) [Law of Portugal pleaded and relied upon]; *Grey* v. *American Airlines*, 227 F. 2d 282, cert. den. 350 U. S. 989 (1956) [Law of Texas pleaded and relied upon].

tained two of them on the theory that the Warsaw Convention created a cause of action. 107 N. Y. S. 2d 768. On appeal the Appellate Division, First Department, affirmed Judge Hecht's decision without opinion. 281 App. Div. 965. This decision, the only one of its kind, and which is clearly contrary to the overwhelming weight of opinion, was rejected by both the District Court and the Court of Appeals in the instant case.

In commenting on the *Salamon* case in a footnote reference in the case at bar, the Court of Appeals said (Pet. 32):

> "As a matter of fact, New York law does not favor the plaintiffs. Although *Salamon* v. *Koninklijke Luchtvaart Maatschappij*, 107 N. Y. S. 2d 768 (Sup. Ct. N. Y. 1951), aff'd, 120 N. Y. S. 2d 917 (1st Dept. 1953) does hold that the Warsaw Convention creates a right of action, *Wyman* v. *Pan American Airways,* 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. 1943), aff'd, 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dept. 1944) holds to the contrary and the latter decision was affirmed by the New York Court of Appeals, 293 N. Y. 878, cert. denied, 324 U. S. 882 (1944)."

CONCLUSION

The petition for certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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